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HR 158
REQUESTING A REVIEW OF THE
ENVIRONMENTAL RIGHTS PROVISION OF
THE CONSTITUTION

Statement for
House Committee on
Ecology and Environmental Protection
Public Hearing, 9 March 1979

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HR 158 requests that the House Committees on Environment, Ecology and Recreation and on Judiciary review the recently adopted Constitutional amendment on environmental rights. This statement on the resolution does not reflect an institutional position of the University.

HR 158 raises two policy questions. The first and in part the second relates to the definition of a "clean and healthful environment" and the extent of the right to such an environment recognized by the constitutional amendment. The Constitutional amendment itself qualifies the right by reference to laws relating to resource protection, environmental quality, pollution control, etc. Although defining the right in this way limits its extent, because it does not allow citizens to challenge the wisdom or "healthfulness" of any of these laws, it also allows the right to evolve with our understanding of the environment's effect on health. Our knowledge in this area is constantly growing and changing, and so should the right of the people to be protected in accord with our best understanding.

Any statutory definition of the right to a "clean and healthful environment" other than that in the Constitution would probably limit the right unconstitutionally.

The second policy question raised in HR 158 has a number of parts on which we provide the following comments:

(A and B) Use of mechanisms for administrative relief prior to seeking recourse in the courts is generally appropriate. However, the constitutional right is a general one, and it cannot legitimately be limited by such bars to administrative or quasi-judicial relief as may exist in the form of, for example, prerequisites of direct economic interest in the effects of an action, or residence in the area of the action. Residents of one area of our islands may have pronounced concerns with the cleanliness and healthfulness of

the environment in others, and such concerns are often not reduceable to economics. Administrative procedures are often such that concerned persons have no knowledge of their initiation or their environmental implications until the procedures are completed. Direct recourse to the courts should be allowed whenever there are no pertinent administrative procedures or the administrative procedures have in effect not been open to those seeking relief from violations of their environmental rights.

(B) The qualification of persons seeking relief from environmental rights cannot be limited for the reasons indicated in (A & B). In most cases, the relief sought by such persons will be in the form of injunctions or mandamus decisions, not damages.

(D) Requirement of good faith is always a factor in any judicial or administrative proceeding, incumbent upon all sides, not just the plaintiff. Good faith is presumed until proven otherwise. No definition of good faith seems needed.

(E) The possible requirement of a bond appears to reflect concerns that frivolous suits may be filed that will result in delays in implementing projects and hence costs to those proposing to undertake them. In Michigan, a state much larger than Hawaii, where an environmental rights provision was enacted in statute, the average number of environmental suits instituted under the provision was less than 40 per year in the first four years, and the rate has been no higher since. Such suits have constituted only 0.2 percent of all civil suits instituted in Michigan. In less than a third of the cases were the decisions adverse to the plaintiff. Other states with similar statutes have experienced even smaller numbers of cases. There is no reason, therefore, to suspect that there will be large numbers of frivolous suits in Hawaii.

A bond requirement would, of course be discriminatory against most citizen groups and the poor, although their rights should be protected equally to those of corporations and the wealthy.

(F) Reasonable limitations on the times in which suits could be initiated to remedy violations of environmental rights would, of course, be appropriate.

(G) Certainly the State and Counties should be encouraged to assert the citizens' rights to a clean and healthful environment. However, if they were always able to do a perfect job, there would have been no need for the Constitutional amendment. Where the government has not acted, citizens should be allowed to act.

(H) The only problem with creating a class action is the burden of notifying members of the affected class. Citizen groups usually do not have the funds and manpower to do the mailing, advertising in the newspapers, etc. We suggest that if an agency schedules a hearing on an environmental right issue, the agency should have responsibility for notifying prospective members of the injured or affected class, and for notifying these same individuals when someone has challenged or intervened in a proceeding to give prospective class members a chance to join the action.

(I) The purpose of awarding special damages to a defendant to cover the costs of his defense in the case of a suit found to be frivolous would be essentially the same as the purpose of requiring a bond of the plaintiff. Indeed one intent of the bond would probably be to cover the defense costs. The purpose of awarding such special damages

to a plaintiff would, we suppose, be the reverse. Our comments on (E) are then pertinent to (I). We note, however, that in (I) the reverse process of awarding special damages to a plaintiff is suggested also.

In (A) through (I) the resolution identifies a number of important issues regarding possible suits intended to curb violations of environmental rights. As (J) suggests, there may be others. We suggest that in the review requested by the resolution, a wide variety of causes of action under the environmental rights amendment be investigated, and that, with respect to each, pertinent existing laws and regulation be examined to see what administrative procedures are involved, what restrictions to the use of these procedures there may be, what penalties are provided, and how any statutory provisions for implementing the environmental right amendment may most usefully be expressed.